Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1303

CARL D. BISHOP,

Petitioner,

vs.

W. H. WOOD, CHIEF OF POLICE
OF THE CITY OF MARION,
NORTH CAROLINA; VICTOR DENTON,
CITY MANAGER OF THE CITY OF
MARION, NORTH CAROLINA; and
THE CITY OF MARION, NORTH
CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

* *

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* *

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## INDEX


| | Page |
|---|---|
| Table of Citations | i, ii |
| Statement of Case | 2 |
| Reasons for Denying the Writ | 1 |
| I. A municipality is not a person within the meaning of 42 U.S.C. Section 1983 so as to give the Court jurisdiction under 28 U.S.C. 1343 | 2, 3 |
| II. A municipal official who acts in good faith within the sphere of his official duties is immune from liability for damages | 3, 4 |
| III. Petitioner has failed to establish jurisdiction by virtue of 28 U.S.C. Section 1331(a) | 5 |
| Conclusion | 6 |


## TABLE OF CITATIONS


| | |
|---|---|
| Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) | 4 |
| City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507, 93. S.Ct. 2222 37 L.Ed2d 109 (1973) | 2, 3, 5 |
| Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 (ED Va. 1970) | 4 |
| Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) | 4 |
| Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) | 3, 4 |

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) 3

Tenny v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) 3

Wood v. Strickland, 95 S.Ct. 992 (1975) 3, 4

STATUTES:

42 U.S.C. sec. 1983 2, 3

28 U.S.C. sec. 1331(a) 5

28 U.S.C. sec. 1331, 1343 2, 5



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* *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* *

Respondents pray that a writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 31, 1975.

## STATEMENT OF THE CASE

From 1969 to 1972 the petitioner, Carl Bishop, was a policeman in the City of Marion, North Carolina. On March 31, 1972, his employment was terminated by the Chief of Police and City Manager. (R. 39). Prior to his discharge the petitioner was, on several occasions, given informal hearings and advised that he would be discharged if he persisted in his refusal to comply with departmental rules. (R. 14). After his discharge and at his request, petitioner was informed by letter that his dismissal was due to unsatisfactory work and failure to attend training schools. (R. 2).

The petitioner then brought this action in a Federal District Court against the City Manager and the Chief of Police in their official capacities, and the City of Marion. (R. 2). He alleged primarily that he was not given notice and a hearing prior to his dismissal in violation of the Fourteenth Amendment's guarantee of procedural due process. (R. 4). Cross-motions for Summary Judgment were filed by both sides. On the basis of the pleading, interrogatories and affidavits filed, the District Court granted Summary Judgment for the respondents. (R. 38-46).

## REASONS FOR DENYNG THE WRIT

### I. A MUNICIPALITY IS NOT A PERSON WITHIN THE MEANING OF 42 U.S.C. SECTION 1983 SO AS TO GIVE THE COURT JURISDICTION UNDER 28 U.S.C. 1343.

Injunctive relief and damages are sought by the petitioner against the City of Marion, North Carolina, a municipality. (R. 2-6). It is respectfully contended that the City of Marion is not subject to suit under 42 U.S.C. Section 1983. In City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37



L.Ed.2d 109 (1973), this Court pointed out that a city is not a "person" under 42 U.S.C. Section 1983 where equitable relief is sought, anymore than it is where damages are sought. Admittedly, the only defendants in City of Kenosha, supra, were municipalities while in this action a municipality and two individuals are named as defendants. Nevertheless, the individual defendants in this action are being sued in their official capicities only (R. 2), and moreover, if a municipality is not a "person" for Section 1983 purposes, it should remain so regardless of how or with whom it is cast as a defendant.

### II. A MUNICIPAL OFFICIAL WHO ACTS IN GOOD FAITH WITHIN THE SPHERE OF HIS OFFICIAL DUTIES IS IMMUNE FROM LIABILITY FOR DAMAGES.

This Court has recognized and applied the doctrine of qualified immunity from liability for damages to legislative officials, Tenny v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); judicial officers, Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2nd 288 (1967); executive officials, Scheuer v. Rhodes, 416 U.S. 232, 247, 248, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974), and school board members, Wood v. Strickland, 95 S.Ct. 992, 998-999 (1975).

Section 1983 should be construed to extend to municipal officials a qualified immunity from liability for damages for essentially the same reasons expressed in Wood v. Strickland, supra, for granting school board members a qualified good-faith immunity. Common-law tradition allows it. Practical exigencies require it.

> "Implicit in the idea that officials have some immunity — absolute or qualified — for their acts is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Scheuer v. Rhodes, supra, 416 U.S. at 241-242.

The tort standards of good faith and reasonableness of action in light of attendant circumstances are the touchstones in deciding whether or not an official should be shielded from liability for damages by the immunity doctrine.

Petitioner does not contend in his petition to this Court that the City Manager or the Chief of Police, in discharging him, acted in bad faith, with malicious intent, or that they knew or reasonably should have known that their action would deprive him of constitutional rights.

Excluded from the good-faith standard is the requirement that officials must anticipate changes in constitutional law. Wood v. Strickland, supra, 95 S.Ct., at 1001; Pierson v. Ray, supra, 386 U.S., at 557; Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 at 188-189 (ED Va. 1970). Petitioner's discharge occurred on March 31, 1972. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2nd 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), were both decided on June 29, 1972, more than three months later.

Petitioner has not alleged nor attempted to show that the City Manager or the Chief of Police acted outside the scope of their duties, or in any manner other than as required by the City's Personnel Ordinance, or in an arbitrary misuse or abuse of the authority lawfully delegated to them.

The petitioner was not discharged without any reason. He was not disharged for a constitutionally impermissible reason. He was discharged for cause—unsatisfactory work and failure to attend training schools. (R. 2).



## III. PETITIONER HAS FAILED TO ESTABLISH JURISDICTION BY VIRTUE OF 28 U.S.C. SECTION 1331 (a).

An alternate basis for invoking jurisdiction of the Federal District Court was alleged by petitioner to be the necessary controversy requirement of 28 U.S.C. Section 1331(a). But as Judge Winter noted in his dissenting opinion, "Whether $10,000.00 is at issue is sharply contested . . ." (Appendix, Petition, p. 29). Respondents have put petitioner to proof of this fact by specifically denying its existence. In view of Respondent's denial, petitioner may not rest on mere allegation. He must prove the allegation. In City of Kenosha v. Bruno, supra, this Court said:

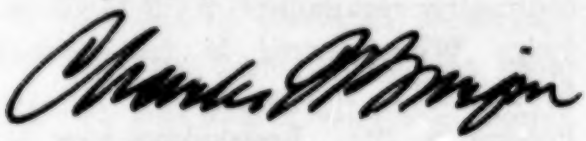
> "But although appellees in the Racine denials alleged jurisdiction pursuant to 28 U.S.C. Section 1331 as well as 1343, and in each complaint there was an allegation of an investment in a tavern of at least $20,000.00, the defendant municipal corporations answered by putting the appellees to their proof as to the amount in controversy. Since the cases were submitted and decided on cross-motions for summary judgment and stipulations of fact, and no stipulation as to the amount in controversy was filed, we cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established. Id. at 515, 93 S.Ct. at 2227.

As in City of Kenosha, this case was submitted and decided by the District Court on cross-motions for summary judgment. Again, as in City of Kenosha, the Court ". . . cannot say on this state of record whether or not jurisdiction over the complaints was affirmaitvely established . . ." Id. at 515, 93 S.Ct. at 2227.

## CONCLUSION

For the reasons set forth above, respondents pray that the Petition for Certiorari be denied.

Respectfully submitted,



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